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Hassan bin Hj Ali Basari v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–207–08 OF 2013
LIM YEE LAN, ABDUL RAHMAN SEBLI AND ZALEHA YUSOF JJCA
7 FEBRUARY 2018

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Criminal Procedure — Appeal — Appeal against conviction — Appellant convicted for offence under s 130M of the Penal Code — Crime of omitting to disclose information pertaining to terrorist act — Whether learned judge had applied his mind correctly to law and facts — Appellant gave unsworn statement from the dock — Whether trial judge properly considered appellant's defence — Whether prosecution proved case beyond reasonable doubt — Whether there was misdirection by learned judge in finding appellant guilty — Penal Code s 130M

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Evidence — Witness — Credibility of — Protected witnesses under s 6 of the Security Offences (Special Measures) Act 2012 — Appellant convicted for offence under s 130M of the Penal Code — Crime of omitting to disclose information pertaining to terrorist act — Prosecution relied on evidence of protected witnesses — Whether veracity and accuracy of evidence by protected witnesses challengeable — Whether learned judge correct in finding that protected witnesses were credible witnesses — Whether appellate court could interfere with learned judge's finding of facts related to credibility of witnesses

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The appellant, a policeman, was charged with the crime of omitting to disclose information pertaining to a terrorist act, an offence punishable under s 130M of the Penal Code. The appellant received the said information from a police informant, PW1 who informed the appellant that while he was selling fish in Bungao, Philippines, he came across men in military fatigues. He heard the men conversing among themselves that 1,500 men had gathered at Pulau Simunul; and they were planning to enter and claim Sabah. It was also established that the appellant had communicated by telephone with an unknown male Sabahan about the impending intrusion at Lahad Datu. The communication was intercepted on 2 March 2013 at 7.37pm and was processed by PW2, an administrative assistant attached to the Bukit Aman Police Headquarters. At the close of the prosecution's case, the learned judge was satisfied that a prima facie case had been established against the appellant. When called upon to state his defence, the appellant elected to give an unsworn statement from the dock and did not call any witness. The appellant said that PW1 lied in court as a 'propaganda' of the special branch to fix him up, and that

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A the evidence of intercepted communication recorded by PW2 was a total fabrication. The appellant further argued that the intercepted communications were inadmissible as the interception was not done by the authorised officer himself ie PW16, but the interception was done by PW2. This offended the rule against subdelegation by a delegate, *delegatus non potest delegare*. At the end
B of the trial, the appellant was found guilty and sentenced to seven years imprisonment. The present appeal was filed by the appellant against the conviction. The focus of the appellant's argument was on the credibility of PW1 and PW2 who were both protected witnesses under s 6 of the Security Offences (Special Measures) Act 2012. The appellant also submitted that the
C learned trial judge was wrong in not accepting the appellant's defence.

Held, dismissing the appellant's appeal against conviction and affirming the decision of the High Court:

D (1) The intercepted communication provided irrefutable yet chilling proof that the appellant was complicit in the armed intrusion at Lahad Datu. Not only did the appellant have 'reason to believe' that a terrorist act would be committed, he had actual knowledge that the terrorist act would be carried out. This surpassed the quantum of proof required to
E establish the element of 'reason to believe' as defined in s 26 of the Penal Code (see paras 19–20).

(2) There was no delegation of power when PW16 instructed PW2 to carry out the interceptions. The decision whether to intercept any communication rested at all times with PW16 and not with PW2. What
F PW2 did was to carry out PW16's instruction, and the interceptions were carried out under his supervision. PW2's role was merely to process the intercepted communications and to translate them when necessary. In any event, illegally obtained evidence was admissible evidence if it was relevant to the matters in issue (see paras 24–25).

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(3) At the close of the prosecution's case, the learned trial judge found that all the essential ingredients of the offence had been proven, hence, prima facie case had been established against the appellant. In arriving at these findings, the learned trial judge had duly complied with the procedural
H requirement of subjecting the prosecution's evidence to a maximum evaluation and to determine whether the witnesses were credible and reliable witnesses. There was no reason for the appellate court to depart from the findings of the learned trial judge as he had applied his mind correctly to the law and to the facts (see paras 29–30).

I (4) It was clear that the learned judge had found PW1 and PW2 to be credible witnesses and he accepted their evidence without reservation. The appellate court does not interfere with findings of fact that involve the question of credibility of witnesses at the drop of a hat. In the present case, although PW1 and PW2 were protected witnesses, it in no way

prevented counsel from challenging the veracity and accuracy of their testimonies by cross-examination. To justify interference, the court must be persuaded to the point of conviction that the learned trial judge had failed to take proper advantage of his having seen and heard the witnesses. In the instant case, the court was not persuaded that the learned judge had fallen into this error (see paras 33–35).

(5) 'Hearsay evidence' and 'information' were two different kettles of fish altogether. The information that PW1 gave to the appellant was not hearsay evidence for the simple reason that it was within his own personal knowledge. It was what he saw with his own eyes and heard with his own ears and not what a third party told him (see para 44).

(6) The appellant's allegation that he had been made a scapegoat by the special branch for the armed intrusion at Lahad Datu was rejected by the learned trial judge. Given the learned judge's finding that PW1 and PW2 were truthful witnesses, the court had no reason to disagree with the learned judge's decision to reject the appellant's defence (see paras 48–49).

(7) It was clear that the learned judge had properly and adequately considered the appellant's explanation and had directed his mind correctly to the proper approach to be taken in dealing with an unsworn statement from the dock. Having considered the appellant's unsworn statement carefully, the learned judge found that the appellant's explanation did not raise any reasonable doubt in his mind as to the truth of the prosecution's case. It was his firm finding that the prosecution had proved its case beyond reasonable doubt. No criticism could be leveled at the manner in which the learned trial judge handled the defence case. It was perfectly in line with the guideline laid down by Suffian J (as he then was) in *Mat v Public Prosecutor* [1963] 1 MLJ 263. There was no misdirection by the learned judge in finding the appellant guilty, hence, there was in the circumstances no cause for appellate intervention (see paras 50 & 52–54).

[Bahasa Malaysia summary

Perayu, seorang anggota polis, didakwa melakukan jenayah iaitu gagal mendedahkan maklumat mengenai tindakan pengganas, suatu kesalahan yang boleh dihukum di bawah s 130M Kanun Keseksaan. Perayu menerima maklumat tersebut dari seorang pemberi maklumat polis, PW1 yang memaklumkan kepada perayu bahawa ketika dia menjual ikan di Bungao, Filipina, dia ternampak beberapa lelaki berpakaian seragam tentera. Dia mendengar lelaki-lelaki tersebut bercakap di antara mereka bahawa 1,500 orang telah berkumpul di Pulau Simunul; dan mereka merancang untuk memasuki dan menawan Sabah. Ia juga telah dibuktikan bahawa perayu telah berkomunikasi melalui telefon dengan seorang lelaki Sabah yang tidak dikenali

tentang pencerobohan yang akan berlaku di Lahad Datu. Komunikasi itu dipintas pada 2 Mac 2013 pada 7.37 malam dan diproses oleh PW2, pembantu tadbir yang bertugas di Ibu Pejabat Polis Bukit Aman. Pada akhir kes pendakwaan, hakim yang bijaksana berpuas hati bahawa kes prima facie telah dibuktikan terhadap perayu. Apabila dipanggil untuk menyatakan pembelaannya, perayu memilih untuk memberikan pernyataan tidak bersumpah dari kendang saksi dan tidak memanggil mana-mana saksi. Perayu mengatakan bahawa PW1 berbohong di mahkamah sebagai 'propaganda' cawangan khas untuk mengenakannya, dan bukti komunikasi yang dipintas yang dicatatkan oleh PW2 adalah palsu. Perayu seterusnya berhujah bahawa komunikasi yang dipintas tidak boleh diterima kerana pemintasan tidak dilakukan sendiri oleh pegawai yang diberi kuasa iaitu PW16, tetapi pemintasan dilakukan oleh PW2. Ini menyalahi peraturan terhadap sub delegasi oleh perwakilan, *delegatus non potest delegare*. Pada akhir perbicaraan, perayu didapati bersalah dan dihukum tujuh tahun penjara. Rayuan semasa telah difailkan oleh perayu terhadap sabitan. Fokus hujah perayu adalah mengenai kredibiliti PW1 dan PW2 yang kedua-duanya adalah saksi yang dilindungi di bawah s 6 Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012. Perayu juga berhujah bahawa hakim bicara yang bijaksana terkhilaf apabila tidak menerima pembelaan perayu.

Diputuskan, menolak rayuan perayu terhadap sabitan dan mengekalkan keputusan Mahkamah Tinggi:

(1) Komunikasi yang dipintas memberikan bukti yang tidak dapat disangkal bahawa perayu terlibat dalam pencerobohan bersenjata di Lahad Datu. Bukan sahaja perayu mempunyai 'alasan untuk mempercayai' bahawa tindakan pengganas akan dilakukan, dia mempunyai pengetahuan sebenar bahawa tindakan pengganas akan dijalankan. Ini melampaui kuantum bukti yang diperlukan untuk membuktikan elemen 'alasan untuk mempercayai' seperti yang ditakrifkan dalam s 26 Kanun Keseksaan (lihat perenggan 19–20).

(2) Tidak ada delegasi kuasa apabila PW16 mengarahkan PW2 untuk menjalankan pintasan tersebut. Keputusan sama ada untuk memintas mana-mana komunikasi adalah pada setiap masa terletak pada PW16 dan bukan dengan PW2. Apa yang PW2 lakukan adalah melaksanakan arahan PW16, dan pintasan tersebut dijalankan di bawah pengawasannya. Peranan PW2 adalah semata-mata untuk memproses komunikasi yang dipintas dan untuk menterjemahkannya apabila perlu. Walau apa pun, keterangan yang diperoleh secara tidak sah adalah keterangan yang boleh diterima jika ia relevan dengan perkara yang menjadi isu (lihat perenggan 24–25).

(3) Pada akhir kes pendakwaan, hakim bicara yang bijaksana mendapati semua unsur penting dalam kesalahan tersebut telah dibuktikan, maka

kes prima facie telah dibuktikan terhadap perayu. Dalam memutuskan dapatan-dapatan ini, hakim bicara yang bijaksana telah mematuhi sepenuhnya kehendak prosedur iaitu meletakkan keterangan pihak pendakwaan untuk penilaian maksimum dan menentukan sama ada saksi-saksi adalah saksi-saksi yang boleh dipercayai. Tidak ada alasan untuk Mahkamah Rayuan menyimpang dari dapatan hakim bicara yang bijaksana kerana beliau telah menerapkan fikirannya dengan betul kepada undang-undang dan fakta (lihat perenggan 29–30).

(4) Adalah jelas bahawa hakim yang bijaksana telah memutuskan bahawa PW1 dan PW2 adalah saksi-saksi yang boleh dipercayai dan beliau menerima bukti mereka tanpa syarat. Mahkamah Rayuan tidak mengganggu penemuan fakta yang melibatkan persoalan kredibiliti saksi-saksi sewenang-wenangnya. Dalam kes ini, walaupun PW1 dan PW2 adalah saksi-saksi yang dilindungi, ia sama sekali tidak menghalang peguam daripada mencabar kesahihan dan ketepatan keterangan mereka dengan pemeriksaan balas. Untuk menjustifikasi campur tangan, mahkamah mesti diyakinkan bahawa hakim bicara yang bijaksana telah gagal untuk mengambil kesempatan yang sewajarnya di atas kesempatannya melihat dan mendengar saksi-saksi. Dalam kes ini, mahkamah tidak yakin bahawa hakim yang bijaksana telah melakukan kesilapan tersebut (lihat perenggan 33–35).

(5) 'Keterangan dengar cakap' dan 'maklumat' adalah dua perkara yang berbeza sama sekali. Maklumat yang diberikan PW1 kepada perayu bukan keterangan dengar cakap atas sebab mudah bahawa ia berada dalam pengetahuan peribadinya sendiri. Ia adalah apa yang dilihatnya dengan matanya sendiri dan didengar dengan telinganya sendiri dan bukan apa yang dikatakan pihak ketiga kepadanya (lihat perenggan 44).

(6) Dakwaan perayu bahawa dia telah dijadikan kambing hitam oleh cawangan khas untuk pencerobohan bersenjata di Lahad Datu ditolak oleh hakim bicara yang bijaksana. Memandangkan hakim bijaksana memutuskan bahawa PW1 dan PW2 adalah saksi-saksi yang benar, mahkamah tidak mempunyai alasan untuk tidak bersetuju dengan keputusan hakim yang bijaksana untuk menolak pembelaan perayu (lihat perenggan 48–49).

(7) Adalah jelas bahawa hakim bijaksana telah dengan betul dan memadai mengambil kira penjelasan perayu dan telah mengarahkan fikirannya dengan betul kepada pendekatan tepat yang perlu diambil dalam menangani pernyataan tidak bersumpah dari kandang saksi. Setelah mempertimbangkan pernyataan tidak bersumpah perayu dengan teliti, hakim bijaksana mendapati bahawa penjelasan perayu tidak menimbulkan keraguan munasabah dalam fikirannya tentang kebenaran kes pendakwaan. Ia adalah dapatannya yang tegas bahawa pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Tidak ada

kritikan yang boleh diberikan terhadap cara hakim bicara yang bijaksana menangani kes pembelaan. Ia betul-betul selaras dengan garis panduan yang ditetapkan oleh Suffian H (pada masa tersebut) dalam *Mat v Public Prosecutor* [1963] 1 MLJ 263. Tidak ada salah arah oleh hakim yang bijaksana dalam memutuskan perayu bersalah, oleh itu, dalam keadaan ini, tidak terdapat sebab untuk campur tangan rayuan (lihat perenggan 50 & 52–54).]

Notes

For cases on appeal against conviction, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 242–320.

For cases on credibility of witness, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3451–3518.

Cases referred to

Chung Kok Yeang v PP [1941] MLJ 163 (refd)
Clarke v Edinburgh and District Tramways Co 1919 SC (HL) 35, HL (refd)
Juraimi bin Husin v PP; Mohd Affandi bin Abdul Rahman & Anor v PP [1998] 1 MLJ 537; [1998] 2 CLJ 383, CA (refd)
Kuruma, Son of Kaniu v R [1955] AC 197, PC (refd)
Lee Boon Gan (f) v Regina [1954] 1 MLJ 103 (refd)
Mat v PP [1963] 1 MLJ 263; [1962] 1 LNS 82 (refd)
Mohamed Salleh v PP [1969] 1 MLJ 104, FC (refd)
Pavallimanakkal Narayan Nampudripad, In re (1916) AIR (Madras) 493 (refd)
PP v G Choudhury [1981] 1 MLJ 76 (refd)
PP v Mohd Amin bin Mohd Razali & Ors [2002] 5 MLJ 406; [2002] 5 CLJ 281, HC (refd)
Ramli bin Kechik v PP [1986] 2 MLJ 33; [1986] CLJ Rep 243; [1986] 1 CLJ 308, SC (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630, FC (refd)
Udayar Alagan & Ors v PP [1962] 1 MLJ 39, CA (refd)

Legislation referred to

Companies Act (Cap 185) [SG] s 132A(1)
Evidence Act 1950 s 27
Penal Code ss 26, 130C, 130M
Security Offences (Special Measures) Act 2012 ss 6, 24

Appeal from: Trial No TWU-45SO-8/4 of 2013 (High Court, Kota Kinabalu)

Ram Singh (Ram Singh & Co) for the appellant.
Awang Armadajaya Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the public prosecutor.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] In the High Court at Kota Kinabalu, Sabah, the appellant, a policeman attached to the Special Branch of the Lahad Datu police, was charged with the crime of omitting to disclose information pertaining to a terrorist act, an offence punishable under s 130M of the Penal Code. The English translation of the charge reads as follows:

> That you, between January 2013 and 3 March 2013, at the office of the Head of the District Special Branch, Lahad Datu District Police Headquarters, in the District of Lahad Datu, in the State of Sabah, having reason to believe that an offence punishable under section 130C of the Penal Code, to wit, a terrorist act would be committed, intentionally omitted to give information respecting that offence, which you were legally bound to give, and thereby committed an offence punishable under section 130M of the Penal Code.

[2] After a full trial of the action, he was found guilty and sentenced to seven years imprisonment, the maximum term allowed by law. The sentence was ordered to run from the date of his arrest on 3 March 2013. This was his appeal against conviction only. Having heard arguments by both sides, we found no merit in his appeal and we dismissed it.

[3] Eight grounds of appeal were proffered by the appellant in assailing the learned judge's decision but seven of the grounds were argued together by learned counsel as they overlapped. Various points of law were raised in these grounds of appeal but the focus of counsel's argument was on the credibility of two key witnesses called by the prosecution, namely PW1 and PW2, who were both protected witnesses under s 6 of the Security Offences (Special Measures) Act 2012 ('the SOSMA').

[4] Being protected witnesses, the identities of PW1 and PW2 were kept secret throughout the trial. They were the lynchpin of the prosecution's case against the appellant. As for the other ground of appeal (ground 8), the complaint was that the learned trial judge was wrong in not accepting the appellant's defence.

[5] The proved facts are these. The appellant was a policeman with the rank of Corporal attached to the Special Branch of the Royal Malaysian Police at Lahad Datu, Sabah since 1990. His task, among others, was to gather intelligence on the Sulu Sultanate and its threat. His duty was to report to the Head of the Special Branch, Lahad Datu Police Headquarters (PW12), any information that he received on any activity of the Sultanate that would threaten the security of Sabah.

[6] The appellant was given this task because he was fluent in the Suluk and

Bajau languages and had good ties with the Sulu community in Lahad Datu. Senior Assistant Commissioner of Police Zulkifli bin Abd Aziz (PW4) gave evidence as follows:

Q:	Adakah kamu tahu mengapa tertuduh dipilih untuk menjadi anggota yang ditugaskan membuat siasatan dan risikan berhubung ancaman Kesultanan Sulu ini?
A:	Anggota ini boleh berbahasa Bajau dan Suluk dan mempunyai ramai kenalan di kalangan suku kaum Suluk di Lahad Datu.
Q:	Pada pengetahuan kamu, adakah kamu tahu siapa di antara pihak Kesultanan Sulu yang dihubungi oleh tertuduh?
A:	Dalam pengetahuan saya, tertuduh ada menghubungi Datu Agbimudin Kiram.
Q:	Adakah kamu tahu siapa Datu Agbimudin Kiram ini?
A:	Saya tahu siapa dia.
Q:	Siapa dia?
A:	Dia merupakan adik kepada Datu Esmail Kiram yang merupakan Raja Muda Kesultanan Sulu.

[7] The evidence was that sometime in January 2013, the appellant met with PW1, a police informer, at an ice cream shop in Lahad Datu, Sabah. At the meeting, PW1 informed him that 1,500 of Datu Esmail Kiram's men were gathering at Pulau Simunul near Bungao, the Philippines to enter and to claim Sabah. PW1 noticed that the appellant jotted down this information on a piece of paper.

[8] True to his role as a police informer, PW1 reminded the appellant to inform his superior about the information. His actual words were 'Jangan abaikan hal ini. Kasitau orang atasan'. The reason why he gave the information to the appellant was because the Special Branch Officer of the Lahad Datu Police Station had told him to pass such information to the appellant if he was not around.

[9] The information that PW1 gave to the appellant was that while he was selling fish in Bungao in the Philippines, he came across men in military fatigues. He saw the words 'Royal Sulu Force' imprinted on their camouflaged uniform. Some of these men boarded his boat as they thought he was going to Pulau Simunul. He heard the men conversing among themselves that:

(a) 1,500 men had gathered at Pulau Simunul; and

(b) they were planning to enter and claim Sabah.

[10] The appellant did not report the information to his superior officers. Three days later, PW1 called him and informed him that four 'pintels' (small boats) had entered Bangkuran, Lahad Datu. This information was also not reported to his superior officers by the appellant.

[11] At the trial, it was established that the appellant had communicated by telephone with an unknown male Sabahan about the impending intrusion at Lahad Datu. The communication was intercepted on 2 March 2013 at 7.37pm and was processed by PW2, an administrative assistant attached to the Bukit Aman Police Headquarters. She was fluent in the Bajau, Suluk and Malay languages. PW2 did not know the two individuals whose communication was intercepted but she recognised their voices and names when they referred to each other in their previous intercepted communications.

[12] In the telephone communication, the male Sabahan was heard telling the appellant that 400 more soldiers would enter Sabah as back-up forces to provide assistance to the Royal Sulu Forces who had entered Kampung Tanduo, Lahad Datu earlier. They were from the Mindanao National Liberation Front (MNLF) forces and the Sultan of Sulu forces.

[13] The appellant had every opportunity to inform his superior officers of this grave security threat during the briefing that he attended on the night of 2 March 2013, but he omitted to do so.

[14] On 3 March 2013 at 9.28am, another telephone communication between the appellant and the male Sabahan was intercepted. What was evident from the conversation was that the appellant knew that the foreign intruders were intent on claiming Sabah and were planning to create disorder through guerilla tactics to achieve their objective, as propagated by 'Nur Misuari'.

[15] By failing to report these information to his superior officers, the appellant must be presumed to have intended to conceal them: See *In re Pavallimanakkal Narayan Nampudripad* (1916) AIR (Madras) 493, where Ayling J said this:

> It is also argued that the word 'intentionally' in the section should be construed in the sense of an intention to conceal the facts which should be reported: but where a person is under a legal duty to report certain facts and fails to report them, he must be presumed to intend to conceal them, unless he can show that he had a reason to suppose that the authority to which the report was due had the information from other sources.

[16] Whether or not an omission is intentional is a question of fact. In this regard, what Howes J said in *Chung Kok Yeang v Public Prosecutor* [1941] MLJ

A 163, which we reproduce below, is directly on point:

> It is clear that the appellant was legally bound under a statutory obligation to exhibit the inventory. His omission to do so was proved; and if the omission cannot be accounted for, it must be regarded as intentional. A man is presumed to have intended his acts; and this applies with equal force to his omissions.
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> As to what amounts to an intentional omission, the question is one of fact, and depends on the circumstances of the case.

[17] Of particular significance to note in the whole scheme of things is that
C the special branch had earlier intercepted a telephone conversation between Datu Amir Bahar and Raja Muda Agbimudin, both protagonists in the intrusion at Lahad Datu. This was on 25 February 2013, in which the two talked about the role played by the appellant in supplying them with information.

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[18] Part of the non-verbatim transcript of the intercepted communication between Datu Amir Bahar and Raja Muda Agbimudin as recorded by PW2 revealed the following:

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> Pada 25 Februari 2013 jam 22.31 Datuk Amir Bahar menyatakan dia mendapat tahu daripada Hassan yang merupakan anggota Polis yang mana pihak berkuasa Malaysia akan masuk jam 12.00 tengah malam nanti. Raja maklum dan memberitahu mereka telah bersedia. Datu Amir Bahar memberitahu Hassan dan Hussin merupakan adik beradik dan mereka juga merupakan ahli 'keluarga kita'. Raja maklum dan beritahu mereka telah bersedia.

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[19] This intercepted communication provides irrefutable yet chilling proof that the appellant was complicit in the armed intrusion at Lahad Datu, a traitor in every sense of the word. Instead of protecting his colleagues from harm, he put them directly in harm's way. Nothing can be more despicable. He was, in
G our view, truly a 'musuh dalam selimut' and had committed high treason. It connects the dots as to why he did not inform his superior officers of the information that he obtained from PW1. He was extremely lucky that the public prosecutor decided to only charge him with a relatively minor offence.

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[20] Not only did the appellant have 'reason to believe' that a terrorist act would be committed, but he had actual knowledge that the terrorist act would be carried out. This surpassed the quantum of proof required to establish the element of 'reason to believe' as defined in s 26 of the Penal Code, as follows:

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> A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing, but not otherwise.

[21] Information that is obtained through intercepted communication under s 6 of the SOSMA is admissible by virtue of s 24 of the same Act, which

reads:

> Where a person is charged for a security offence, any information obtained through an intercepted communication under section 6 shall be admissible as evidence at his trial and no person or police officer shall be under any duty, obligation or liability or be in any manner compelled to disclose in any proceeding the procedure, method, manner or any means or devices, or any manner whatsoever with regard to anything done under section 6.

[22] There is no dispute that the offence that the appellant was charged with was a security offence. The appellant however contended that the intercepted communications were inadmissible as the interception was not done by the authorised officer himself, namely Supt Annuar (PW16) but by PW2. This according to learned counsel offended the rule against subdelegation by a delegate, *delegatus non potest delegare*.

[23] It was further argued that since the intruders communicated in the Suluk language, the police officer authorised under section 6 of SOSMA to intercept the communications must be competent in that language, which PW16 was not. The complaint was directed at the following observations by the learned judge, which learned counsel said was a misdirection:

> In the instant case, as I pointed out earlier, it is plainly impossible for an authorized officer such as Supt Annuar to intercept and translate a conversation which is conducted in a language that he does not understand. Therefore it is difficult for one to imagine what unfairness or prejudice could have been occasioned to the accused when PW2 who worked under the supervision of the Supt Annuar typed P5, P6 and P7 after listening to the intercepted conversation. In the premises there can be no valid suggestion that P5, P6 and P7 related to the knowledge of the accused in respect of the movement of foreign intruders. Therefore, they have high probative value and are relevant. For this reason they are admissible.

[24] We found no merit in the argument. There was no delegation of power when PW16 instructed PW2 to carry out the interceptions. The decision whether to intercept any communication rested at all times with PW16 and not with PW2. What PW2 did was to carry out PW16's instruction, and the interceptions were carried out under his supervision. PW2's role was merely to process the intercepted communications and to translate them when necessary.

[25] In any event, illegally obtained evidence is admissible evidence if it is relevant to the matters in issue: see the case of *Ramli bin Kechik v Public Prosecutor* [1986] 2 MLJ 33; [1986] CLJ Rep 243; [1986] 1 CLJ 308 where the Supreme Court cited with approval the following pronouncements by Lord Goddard in the Privy Council case of *Kuruma, Son of Kaniu v R* [1955] AC 197:

A In Their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in
B principle.

[26] It was also revealed at the trial that the appellant had a good relationship with the Sulu Sultanate. This was established through the testimony of PW4 and the telephone calls made by the appellant to Raja Agbimudin Kiram, who
C headed the intrusion by the Royal Sulu forces at Lahad Datu. The appellant also knew Datu Piah, who had participated actively in the intrusion.

[27] The intrusion at Lahad Datu took, among others, the lives of Corporal Sabaruddin bin Daud and Insp Zulkifli bin Mamat of the VAT69 Commando
D unit. Evidence relating to the death of Corp Sabaruddin bin Daud came from Supt Mancha ak Ata (PW5) who led his group from VAT69 Commando in the skirmishes at Kampung Tanduo, Lahad Datu on 1 March 2013. This was his recollection of the incident:

E Q: Apa yang berlaku semasa rondaan dibuat pada 1 Mac 2013 tersebut?

A: Lebih kurang 9.50 pagi, saya bersama kumpulan terserempak lebih kurang 35 hingga 40 musuh dan dalam jarak 30 meter, musuh telah mencabar dan menjerit ke arah kumpulan saya dan mengatakan
F 'Tiger keluar kau dari sini, ini bumi kami'.

...

A: Mereka terus melepaskan tembakan bertalu-talu ke arah saya dan kumpulan.

G Q: Apa tindakan kamu dan kumpulan kamu?

A: Saya bersama kumpulan terus mengambil posisi perlindungan dan terus membalas tembakan ke arah musuh.

Q: Semasa pertempuran tersebut, ada kamu melihat sesiapa dalam
H anggota kamu yang tercedera atau terkorban?

A: Pada masa pertempuran tersebut, seorang anggota saya iaitu Koperal Sabaruddin bin Daud telah terkorban akibat cedera parah di kepala ditembak oleh musuh.

I **[28]** The post-mortem that was conducted on the bodies of the late Corporal Sabaruddin bin Daud and Inspector Zulkifli bin Mamat confirmed that they died of gunshot wounds to the head. What is done cannot be undone but we cannot help wondering if they would still be alive today if not for the appellant's traitorous acts and omissions.

[29] At the close of the prosecution's case, the learned trial judge was satisfied that a prima facie case had been established against the appellant. He found the following essential ingredients of the offence to have been proved by the prosecution:

(a) that the appellant had reason to believe that a terrorist act would be committed;

(b) that the appellant omitted to give the information respecting the s 130C of the Penal Code offence; and

(c) that the appellant was legally bound to give information respecting the s 130C of the Penal Code offence.

[30] In arriving at these findings, the learned trial judge had duly complied with the procedural requirement of subjecting the prosecution's evidence to a maximum evaluation and to determine whether the witnesses were credible and reliable witnesses. We found no reason to depart from his findings as he had applied his mind correctly to the law and to the facts.

[31] As the trial judge, the learned judge had the audio-visual advantage of seeing and hearing first-hand the witnesses giving evidence and was undoubtedly in the best position to assess their creditworthiness. We on the other hand only had the printed notes of evidence to rely on. These cold prints tell us nothing about the demeanour and behavior of the witnesses while giving evidence, especially when answering hard questions during cross-examination. We should perhaps reproduce what Lord Shaw said in *Clarke v Edinburgh and District Tramways Co* 1919 SC (HL) 35 at p 36:

> In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page.

[32] While it is true that demeanour is not the touchstone of truth, it is also true that it gives the trial judge a sense of the witness' inclination, either to be truthful or to be untruthful. We do not think one has to be a trained psychologist to detect falsehood. That applies equally well to the trial judge.

[33] In this regard, it is clear that the learned judge had found PW1 and PW2 to be credible witnesses and he accepted their evidence without reservation. This is what he said:

> On PW1
>
> I find that PW1 had given credible evidence about the information that he passed

A to the accused. Although he is a 'protected witness' under SOSMA, counsel for the accused had full opportunity to cross-examine him through the court interpreter. He answered all questions confidently and without hesitation. I cannot think of any reason why he would want to incriminate a police officer such as the accused. There was no suggestion put to him that he had underlying reasons to fabricate evidence.
B PW1 appeared to have no motive at all to do so. Furthermore he stood up well to cross-examination.

On PW2

During re-examination, PW2 repeated that P5, P6 and P7 contained information
C from the said intercepted communications. As the witness was confident about the contents of the non-verbatim transcripts, I see no reason not to accept her evidence.

[34] The principle on appellate intervention with findings of fact that involve the question of the credibility of the witnesses is too well established for
D us to cite any authority for the relevant proposition of law. Suffice for us to say that an appellate court does not interfere with such findings of fact at the drop of a hat. In the present case although PW1 and PW2 were protected witnesses, which means their identities were kept from counsel's view, it in no way prevented counsel from challenging the veracity and accuracy of their
E testimonies by cross-examination.

[35] To justify our interference with the learned judge's findings of fact, we must be persuaded to the point of conviction that the learned trial judge had failed to take proper advantage of his having seen and heard the witnesses. We
F were not persuaded that the learned judge had fallen into this error. It would therefore be wrong for us to substitute his conclusions with that of our own. The right thing for us to do in the circumstances would be to defer to his findings.

G

[36] There was therefore no substance to the appellant's contention that the learned trial judge erred in finding the prosecution witnesses, particularly PW1 and PW2 to be credible witnesses.

H **[37]** Learned counsel had argued, within grounds 1–7 of the petition of appeal, that the information that PW1 'received' was hearsay as the source of the information was not revealed and had come from a third party. We were unable to accede to the argument. It would appear that learned counsel was equating 'hearsay evidence' with 'information'. With due respect, these are not
I synonymous terms. First, the word 'information'. *The Concise Oxford Dictionary* (9th Ed) defines it as follows:

> *1 a* something told; knowledge. *b* (usu. foll. by on, about) items of knowledge; news (the latest information on the crisis). *2* with a court or magistrate. *3 a* the act of informing or telling.

[38] In KJ Aiyar's *Judicial Dictionary*, the word is defined as follows: A

> In its ordinary sense, 'information' is a wider term and includes any communication relating to the commission of an offence.

[39] In *Public Prosecutor v G Choudhury* [1981] 1 MLJ 76 the Singapore Criminal Court of Appeal was dealing, inter alia, with the word 'information' in s 132A(1) of the Companies Act (Chapter 185). Sinnathuray J delivering the judgment of the court had this to say at p 78: B

> In our view, 'information' as used in the section means knowledge of a particular event or situation such as advice, communication, intelligence, news, notification and the like. C

[40] Within our shores, the meaning of the word as used in s 27 of the Evidence Act 1950 was explained by the Federal Court in *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630 in the following terms at p 644: D

> It is very important to note that s 27 of the Evidence Act uses 'information' instead of 'statement'. Information connotes two things — (a) a statement or other means employed for imparting knowledge possessed by one person to another and (b) the knowledge so derived by the other person. Explaining this in *Karam Din v Emperor* AIR 1929 Lahore 338 Dalip Singh J said: E
>
> > In connection with this it is necessary to bear in mind that the word 'information' cannot be used as synonymous with the word 'statement'. There is no reason why the word 'information' should have been used instead of the word 'statement' in the section if by 'information' statement alone was intended. The word 'information' as distinct from the word 'statement' connotes two things, namely a statement or other means employed for imparting knowledge possessed by one person to another, and the knowledge so derived by the other person. It is unnecessary to enter into the question whether all means of imparting knowledge by one person to another person are not covered by the word 'statement' but it is necessary to emphasise the second portion, namely, that *'information' also includes the knowledge derived by the person informed from the informant*. To me, therefore, it seems clear that when a person deposes simply to the following effect, namely, that from information received from the accused he proceeded to do certain things and discovered certain other things, the statement is by itself relevant and admissible in evidence against the accused. In order to make it irrelevant or inadmissible against the accused, it would not be sufficient merely to put a question to the deponent which tended to show that the information was derived from an oral statement made by the accused, for the fact that there was such an oral statement would not make the statement inadmissible for the reason that *the word 'information' includes, as already stated, the knowledge derived by the person as well as the means taken to impart that knowledge*. (Emphasis added.) F G H I

[41] As for the words 'hearsay evidence' and 'hearsay rule', they convey

entirely different meanings. The following definitions given by *Black's Law Dictionary* (Deluxe 9th Ed) are relevant:

> hearsay. (16c) 1. Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence.
>
> hearsay rule. (1896) The rule that no assertion offered as testimony can be received unless or is or has been open to test by cross-examination or an opportunity for cross-examination, except as provided otherwise by the rules of evidence, by court rules, or by statute. The chief reasons for the rule are that out-of-court statements amounting to hearsay are not made under oath and are not subject to cross-examination.

[42] *The Oxford Dictionary of Law* gives a rather long definition of the words 'hearsay evidence', as follows:

> 'hearsay evidence' Oral or written statements made by someone other than during his testimony in court but which the court is asked to accept as evidence for the truth of what is stated. In general, hearsay evidence has been inadmissible (the rule against hearsay) but this principle has always been subject to numerous exceptions. In civil proceedings, the Civil Evidence Act 1995 abolished the rule against hearsay and provides that what would formally have been called 'hearsay evidence' may be used when a notice of the intention to rely on that evidence is given. It is for the court to decide at trial what weight to put on any particular evidence, whether it is hearsay or not. The admissibility of hearsay evidence in criminal proceedings is now governed by the Criminal Justice Act 2003, which provides that a statement not made in oral evidence in the proceedings may be admissible as evidence of any matter stated if the court is satisfied that it is in the interests of justice for it to be admissible. The Criminal Justice Act 2003 specifically provides for the admissibility of hearsay evidence of unavailable witnesses and preserves the common law rules relating to the admissibility of res gestae and confessions in criminal proceedings. The Act also provides for the admissibility of previous inconsistent statements and other previous statements, including complaints made by a victim as soon as could reasonably be expected after the offence was committed.

[43] The term 'hearsay rule' on the other hand is given the following meaning by the *Dictionary of Legal Terms* (5th Ed) by Steven H Gifis, which is equally long:

> 'HEARSAY RULE' a rule that declares not admissible as evidence any statement other than that by a witness while testifying at the hearing and offered into evidence to prove the truth of the matter stated. The hearsay statement may be oral or written and includes nonverbal conduct intended as a substitute for words (such as a nodding of the head). If, for example, a witness' statement as to what he or she heard another person say is elicited to prove the truth of what that other person said, it is hearsay. If, however, it is elicited merely to show that the words were spoken, it is not hearsay. The witness' answer will be admissible only to show that the other person

spoke certain words and not to show the truth of what the other person said. The reason for the hearsay rule is that the credibility of the witness is the key ingredient in weighing the truth of his or her statement; so that when that statement is made out of court, without the benefit of cross-examination and without the witness' demeanor being subject to assessment by the trier of fact (judge or jury), there is generally no adequate basis for determining whether the out-of-court statement is true.

[44] So, 'hearsay evidence' and 'information' are two different kettles of fish altogether. The information that PW1 gave to the appellant was not hearsay evidence for the simple reason that it was within his own personal knowledge. It was not something that he came to know of from a third party not called as a witness. It was what he saw with his own eyes and heard with his own ears and not what a third party told him. Learned counsel was therefore misconceived in contending that the information that PW1 gave to the appellant was hearsay evidence.

[45] When called upon to state his defence, the appellant elected to give an unsworn statement from the dock and did not call any witness. His defence was a total denial of the offence charged. He said PW1 lied in court as a 'propaganda' of the Special Branch to fix him up, and that the evidence of intercepted communication recorded by PW2 was a total fabrication.

[46] As for the evidence that he met up with Datu Piah in Lahad Datu town on 13 February 2013, which was one day after the intrusion at kampong Tanduo by the followers of the Sulu Sultanate, the appellant did not deny that it did take place but explained that the reason why he did not make an intelligence report of the meeting (and what was said by Datu Piah at the meeting) was because he was on leave. He said he left for Kota Kinabalu the following day to arrange for his son's engagement. He said he had told an officer on duty at the Lahad Datu Special Branch Operations Room about the meeting.

[47] This claim by the appellant that he left for Kota Kinabalu the following day, ie on 14 February 2013 was a deliberate lie because on that date he was with Corp Ajerah (PW14) at the Lahad Datu Police Headquarters, helping her to prepare a powerpoint presentation on the terrorist intrusion at Kampung Tanduo. PW14's evidence was as follows:

Q: Pada 14.2.2013, lebih kurang 2.30 petang, adakah kamu ada melakukan apa-apa tugas?

A: Ada.

Q: Apa tugas yang kamu lakukan?

A: Membuat taklimat secara Powerpoint atas arahan Ketua Cawangan Khas Lahad Datu.

Q: Taklimat melalui Powerpoint ini adalah mengenai perkara apa?

A: Mengenai insiden pencerobohan di Kg Tanduo, Lahad Datu.

Q: Ada sesiapa lagi yang bersama kamu menyediakan taklimat Powerpoint ini?

A: Ada. Koperal Detektif Hassan bin Hj Ali Basari.

[48] In evaluating the appellant's defence, it did not escape the learned judge that a recurring theme in his unsworn statement from the dock was his claim that he had been made a scapegoat by the special branch for the armed intrusion at Lahad Datu. This was what he alleged:

> Saya percaya bahawa PW1 (Protected Witness 1) yang memberi keterangan di Mahkamah adalah 'Lantas'. Keterangan 'Lantas' di Mahkamah yang kononnya dia ada memberi maklumat kepada saya bahawa ada 1,500 orang Suluk berkumpul di Simunul dan 4 pintel masuk Bangkuran, Lahad Datu adalah tidak benar dan tidak pernah berlaku di Lahad Datu. Saya dimaklumkan di dalam taklimat pagi bahawa tiada pencerobohan berlaku selepas 16hb Februari 2013 oleh pengikut Kesultanan Sulu. Keterangan 'Lantas' adalah propaganda oleh pihak Cawangan Khas untuk mengenakan saya agar saya disabitkan di Mahkamah ini.

[49] The allegation was rejected by the learned trial judge, which demolished the whole substratum of his defence. Given the learned judge's finding that PW1 and PW2 were truthful witnesses, we had no reason to disagree with his decision to reject the appellant's defence.

[50] From his grounds of judgment, it is clear that the learned judge had properly and adequately considered the appellant's explanation and had directed his mind correctly to the proper approach to be taken in dealing with an unsworn statement from the dock, having referred to the following observations by Zulkefli Ahmad Makinudin J (now PCA) in *Public Prosecutor v Mohd Amin bin Mohd Razali & Ors* [2002] 5 MLJ 406; [2002] 5 CLJ 281:

> The position in law is that the right of an accused person to make an unsworn statement from the dock is a substantive right. However, we must bear in mind that statement from the dock is not sworn evidence which can be the subject of cross examination. Not so much weight can be given to what the accused said in the dock when compared to what the accused would give under sworn evidence. This is so because when a man gives evidence one can cross examine him and test his evidence and generally have a better opportunity of assessing him. Nevertheless, the law is very clear that the court cannot outright reject such evidence. The court must consider it and give it such weight for what it is worth and think fit having regard to the evidence adduced as a whole before the court.

[51] The following cases are also relevant on the issue of weight to be given to an unsworn statement from the dock: *Lee Boon Gan (f) v Regina* [1954] 1 MLJ 103; *Udayar Alagan & Ors v Public Prosecutor* [1962] 1 MLJ 39; *Juraimi bin Husin v Public Prosecutor; Mohd Affandi bin Abdul Rahman & Anor v Public Prosecutor* [1998] 1 MLJ 537; [1998] 2 CLJ 383; *Mohamed Salleh v Public Prosecutor* [1969] 1 MLJ 104. The general principles that can be distilled from these cases are:

(a) because the statement from the dock is not made under oath and not subject to cross-examination, it is not entitled to the same weight as evidence given under oath;

(b) the judge may wonder why the accused elected to do so. While the judge may not draw adverse inference against him for electing to make the unsworn statement from the dock, he can draw the appropriate inference for his refusal or reluctance to give sworn evidence and subjecting himself to cross-examination; and

(c) at the end of the day, the court is free to give the dock statement the weight it deserves or not at all, having regard to the totality of the evidence and the probabilities of the case.

[52] Having considered the appellant's unsworn statement carefully, the learned trial judge found that his explanation did not raise any reasonable doubt in his mind as to the truth of the prosecution's case. It was his firm finding that the prosecution had proved its case beyond reasonable doubt. This is what His Lordship said:

> For all the above reasons, I find the defence disclosed in the unsworn statement is unbelievable. I have also considered whether the unsworn statement, though I disbelieve it, raises a reasonable doubt in the case for the prosecution. I find that it does not. It is simply a bare denial which is unsupported by credible evidence. In conclusion, it is my finding that the unsworn statement, when considered in its totality and evaluated in the light of the prosecution's case, does not raise a reasonable doubt against the whole of the prosecution's case. I therefore find that the prosecution has proved the guilt of the accused beyond reasonable doubt. I find the accused guilty and convict him of the offence with which he is charged.

[53] No criticism could be leveled at the manner in which the learned trial judge handled the defence case. It was perfectly in line with the guideline laid down by Suffian J (as he then was) in *Mat v Public Prosecutor* [1963] 1 MLJ 263; [1962] 1 LNS 82. The guideline, in Suffian J's own words, is as follows:

> The position may be conveniently stated as follows:
>
> (a) If you are satisfied beyond reasonable doubt as to the accused's guilt ... Convict.
>
> (b) If you accept or believe the accused's explanation ... Acquit.

A

(c) If you do not accept or believe the accused's explanation ... Do not convict but consider the next steps below.

(d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt ... Convict

B

(e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt ... Acquit.

[54] There was therefore no misdirection on the part of the learned trial judge in finding the appellant guilty of the offence charged. There was in the circumstances no cause for appellate intervention.

C

[55] It was for all the foregoing reasons that we unanimously dismissed the appellant's appeal against conviction and affirmed the decision of the High Court.

D

Appellant's appeal against conviction dismissed; decision of High Court affirmed.

Reported by Dzulqarnain Ab Fatar

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